

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
POP THE DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by Irene
Gomez-Bethke, Commissioner,
Department of Human Fights,

Complainant,

V.

office of County Auditor,
Douglas County, by William J.
Anderson, County Auditor,

Respondents.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

The above-entitled matter came on for hearing before Jon L. Lunde, duly appointed Hearing Examiner, commencing at 10:00 a.m. on Friday, July 22, 1983, at the Douglas County Courthouse, Second Floor, in Alexandria, Minnesota, pursuant to a Notice and Order for Hearing dated March 10, 1983.

Carl Warren, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, appeared as counsel on behalf of the Complainant. Thomas J. Reif, Douglas County Attorney, 1017 Broadway, Box 819, Alexandria, Minnesota 56308, appeared as counsel on behalf of the Respondent. The record closed on October 18, 1983, after the parties' briefs were filed and post-hearing motions were decided.

NOTICE

Pursuant to Vann. Stat. 363.071, subd. 2 (1982), as amended by Minn. Laws 1983, Ch. 301, 201, this Order is the final decision in this case and under Minn. Stat. 363.072 (1982), as amended by Minn. Laws 1983, Ch. 247, 144-145, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. 14.63 through 14.69 (1982), as amended by Minn. Laws 1983, Ch. 247,

9-14.

STATEMENT OF ISSUE

The issue in this case is whether or not the respondent discriminated against a female applicant for the position of Deputy County Auditor on the basis of her sex by offering her the job at a lower salary than it was offered to a less qualified male applicant after she refused the job; and if so, the damages, if any, that should be payable to that female applicant.

Based on all of the proceedings herein, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Charging Party in this case, Lael Adaer Maas, a woman, is a resident of Alexandria, Minnesota. Her employment history primarily involves work as an accountant and bookkeeper. Her educational background consists of a high school diploma obtained in 1963, followed by attendance at St. Olaf College for 5 1/2 months. For 1 1/2 years between 1965 and 1968 she was employed as a high school secretary, whose major job duty involved bookkeeping functions and the preparation of financial reports. In the fall of 1968, she became employed as an accountant/bookkeeper for the accounting firm of Ness, Neumann, Waller & Nygaard, where she worked for 9 1/2 years through June 15, 1978. She does not have an accounting degree and is not a certified public accountant.

2. Maas last salary with Ness, Neumann, Waller & Nygaard was \$4.38 per hour or \$759.20 monthly (40 x 4.38 x 52 divided by 12). She earned an average monthly salary of \$783 in 1977 due to the overtime work required of her, especially during tax season.

3. (1a) or about June 1, 1978, Dan Ness, one of the accounting firm's partners, advised Maas that her position would probably not be available in the fall. He suggested that she apply for the Deputy County Auditor position he had seen advertised in the local newspaper. She took his advice and on the same day she applied for the Deputy County Auditor position with William Anderson, the Douglas County Auditor. Anderson generally discussed the job with her at that time and advised her that the monthly salary for the position would be between \$750 and \$800 a month. She considered that to be an adequate salary and told him she was available immediately.

4. William C. Anderson was appointed Douglas County Auditor on December 1, 1977 when a vacancy in that position occurred. The Deputy County Auditor at that time was Rod Bunting. Bunting was in charge of the preparation of tax statements and data processing and was paid a monthly salary of \$1,000. Bunting quit his job effective June 1, 1978, creating a vacancy which

Anderson was attempting to fill. Notice of that vacancy was published in local newspapers. The notice, which Ban Ness saw, stated that the salary payable would be based on the successful applicant's qualifications. Anderson was authorized lay the County Board to pay as much as \$1,000 per month to the successful applicant. Maas, herself, never saw the newspaper advertisement.

5. Anderson evaluated the written applications he received and selected approximately six finalists whom he would personally interview for the vacancy. Maas was not given a second interview but Anderson called 'her and asked if she was still interested. She told him she was.

6. Anderson completed his interviews of the finalists on Friday, June 16, 1978. He was anxious to hire a replacement for Bunting and wanted to promptly advise the applicants of his selection. (Ai Friday, aAft er he interviewed the final candidate, he decided that Maas was the most qualified person for the position. consequently, the same day, he wrote a letter to 'her advising her that she had been selected for the position. At the same time, 'he wrote letters to the other applicants advising them that someone else had been selected. He had not yet spoken to Maas or offered her the job.

7. On Sunday evening, June 18, 1978, Anderson telephoned Maas at home and offered her the job. She asked him what salary she would be paid. He told her that the salary would be \$700 monthly. She told him that \$700 was not enough. At that point 'he said: "You don't want the job then?" She said: "no." No other discussions or salary negotiations occurred during that phone conversation and both parties hung up.

8. A few minutes later Anderson called Thomas E. Reddick, his second choice, and offered Reddick the position at a monthly salary of \$800. During his prior interview, Reddick told Anderson that 'he would not accept the position for less than \$800 monthly.

9. Approximately one -hour after her initial phone conversation with Anderson, and after Reddick had accepted the job, Maas telephoned Anderson and told him she would accept the job at the \$700 salary. At that time, she was advised that the vacancy had already been filled.

10. On November 9, 1978, after Maas learned that the Deputy Auditor position had been offered to Reddick at \$800 monthly, she filed a verified complaint with the Minnesota Department of Loan Rights, charging the Douglas County Auditor with sex discrimination. Her complaint was not successfully conciliated or resolved and on March 10, 1973, the Complainant issued its Complaint in this case, which was duly answered by the Respondent on March 16, 1973.

11. The Charging Party, Leal Maas, was the most qualified candidate for the Deputy Auditor position, but was offered \$100 per month less than the next most qualified candidate, Thomas Reddick. Maas would have immediately accepted the position if she had been offered \$800 monthly.

12. During One summer of 1978, Maas' husband was working on a construction project in the Twin Cities and was gone from early Monday morning to Friday night each week. her two children were 12 and 13 year's old at that time.

13. (Xi November 7, 1978 Anderson signed an affidavit to be used in an unemployment compensation hearing (Exhibit 1). In that affidavit he swore, in part, as follows:

On June 16, 1978 tr decided that I would offer the job to Leal boas and subsequently called her on June 18, 1978, Sunday night to ask her if she would accept the job. Upon being offered the job she hummed & haugjhed [sic] & wanted to know what the pay would be. I told her it would be \$850/month. She indicated further as she thought about it

on the phone that she was thinking that the job probably wasn't the right job for her. I then asked her "'You're not going to take the job then?" and she responded by, saying "No," she wasn't going to take it.

I immediately called the next applicant in line for the job and 'he accepted it. The rate of pay I of fered him was \$50.00 less per month because I didn't feel he was quite as qualified.

14. Da November 24, 1978 Anderson wrote to the Commissioner of Human

Rights stating that Maas was not as qualified as Reddick and that he offered

her the job at \$700 monthly because that was her worth to the County. In that

letter he also said Reddick was offered \$800 monthly because that was 'his

worn to the County.

15. After Maas rejected the position at the salary offered to 'her, she actively sought employment in and around the Alexandria area. she remained unemployed, however, until March 15, 1979 when she began working for Dot Distributing Inc. She has been continuously employed since that date earning \$5,690.68 in 1979 and \$8,172.01 in 1980.

16. Reddick's earnings as a Douglas County employee in the position Maas applied for were as follows: \$4,981.82 in 1978, \$10,272.00 in 1979, and \$5,634.00 during the first six months of 1980, after which his position was discontinued and he obtained different employment with die County.

17. During the period from June 26, 1978 through June 30, 1980 Maas earned \$11,111 less than she would 'have earned had she been employed by the Cbunty and paid the same compensation Reddick received.

Based on tie foregoing findings of fact, the Hearing Examiner makes the following

CONCLUSIONS

1. 'Mat the Cbmplainant gave proper notice of the hearing in this matter and has fulfilled all relevant substantive and procedural requirements of law and rule.

2. 'Ant the Hearing Examiner has jurisdiction herein and authority to order tie relief requested under Minn. Stat. 363.071, subd. 2 (1978) and 14.50 (1982).

3. That the Respondent is an employer as defined in Minn. Stat. 363.01, subd. 15 (1978).

4. 'Mat the complainant established a. prima facie showing that the Re-spondent discriminated against the Charging Party on the basis of her sex and with respect to her hire and compensation contrary to the provisions of Minn. Stat. Sec. 363.03 Subd. 1 (2)(c).

5. That the Respondent's articulated reasons for offering Reddick a higher salary than was offered to Maas are untrue and a pretext for illegal sex discrimination.

6. That the Complainant established, by a preponderance of the evidence, that the Pespondent's decision to offer a position to Maas on substantially

less favorable terms than the same position was offered to Reddick was based on sex.

7. That Maas would have accepted the position if it had been offered to her at the salary offered to Reddick.

8. That as a result of the Respondent's discriminatory act the Charging Party lost income of \$11,111.

9. That the Charging Party is entitled to receive the income, with interest, she lost as a result of the Respondent's discriminatory acts.

Based on the foregoing Conclusions, and for the reasons set forth in the attached Memorandum:

IT IS ORDERED:

1. That the Respondent pay to Lael Maas \$11,111. representing the wages she lost between June 26, 1978 and June 30, 1980.

2. That the Respondent pay the Charging Party \$2,122.38 as interest on her lost wages calculated at the rate of six percent per annum from June 30, 1980 through June 30, 1983.

3. That the Respondent cease and desist from discriminating against job applicants on the basis of their sex by offering employment to women on less favorable terms than such offers are made to men.

4. That Respondent pay \$250 as punitive damages to the Charging Party.

Dated this 21 day of November, 1983.

JON L. LUNDE
hearing Examiner

Reported: Taped

MEMORANDUM

The Respondent is charged with a violation of Minn. Stat. 363.03, subd.

1(2)(C)(1978) which provides, in part, as follows:

Subd. 1. Employment. Except when based on a bona fide occupational qualification, it is an unfair employment practice:

(2) For an employer, because of sex

(c) To discriminate against a person with respect to his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

The provisions of the Minnesota Human Rights Act, Chapter 363, are modeled

after Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e et seq.

The principles enunciated by the federal courts in cases involving the federal

Act are applicable in construing the Minnesota Act. *Danz v. Jones*, 263 N.W.2d

395 (Minn. 1978). The ultimate burden of persuasion to establish an act of

illegal discrimination rests at all times with the Complainant and involves a

three-step process of pleading and proof. First the Complainant must estab-

lish a prima facie case of discrimination. The Respondent must then rebut the

prima facie case by articulating some legitimate, nondiscriminatory reason for the employment action, and the Complainant may then show that the proffered

reasons are a mere pretext for illegal discrimination. *Hubbard v.. United*

Press Intern., Inc., 330 N.W.2d 428, 441 n. 12 (Minn. 1983).

The elements of a prima facie showing of illegal discrimination normally

follow the principles annunciated by the United States Supreme Court in

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). however, the estab-

lishment of a prima facie case of discrimination is not an onerous burden.

All the Complainant needs to show are the bare essentials of unequal treat-

ment. Danz v. Jones, supra. The McDonnell-Douglas formula is not the exclusive means by which a prima facie showing of discrimination may be made and the elements of a prima facie case adopted in that case are not intended to be rigid, mechanized or ritualistic. It is only necessary that facts are established from which one can infer, if such acts remain unexplained, that it is more likely than not that the actions complained of were based on illegal criteria. Furnco Construction Corp. v. Waters, 438 U.S. 567, 17 FEP 1062 (1978).

In cases involving a discriminatory refusal to hire, the elements of a prima facie case (the McDonnell-Douglas formula) consist of the following:

(1) That the Charging Party belongs to a protected class, (2) That she applied for and was qualified for a job for which the employer was seeking applicants; (3) That despite her qualifications she was rejected for employment; and (4) That after rejection the position remained open and the employer continued to seek applicants from persons with her qualifications.

The McDonnell-Douglas elements of the prima facie case have been adapted

to other forms of illegal discrimination. See, 2 Larson, Employment Discrimination 50.22. In this case, the third and fourth elements of the McDonnell-Douglas formula must be adjusted to read as follows: (3) that the

applicant rejected the employment due to dissatisfaction with the salary offered; and (4) that the employer subsequently offered the position to a less qualified male applicant at a higher starting salary. The

complainant has established a prima facie showing of sex discrimination using these elements.

As a woman, Maas is the member of a protected class and it is admitted

that she applied for a position the respondent was seeking applicants to fill. Maas also established that she was qualified for the position -- due to

her experience and the fact that she was offered the job -- and that she rejected it because she was dissatisfied with the salary offered.

She also established that after she rejected the position it was offered to a less

qualified male applicant at a higher starting salary. 'These facts, unless

explained, raise a clear inference of discrimination on the basis of sex.

Discrimination of the nature alleged here raises an issue of first impression and merits some discussion. Under Minn. Stat. 363.03, subd. 1(2), it is not necessary that the Charging Party be an employee before the statutory prohibitions come into play, and it is not necessary that the discrimination consist of a refusal to hire. In Sibley Memorial Hospital v. Wilson, 448 F.2d 1338 (D.C. Cir. 1973), the court held that the words, "any individual", in 200C(e)(2) (a) (1), which makes it unlawful for an employer to discriminate against any individual on the basis of sex, reach beyond the customary employment relationship and afford protection even in the absence of such relationship. The same ultimate conclusion is applicable to the Minnesota Human Rights Act. The Act does not define an employee and subd. 1(2) does not limit illegal discriminatory practices to employees. On the contrary, in all instances except discharges, the Act refers to "a person" and not an employee. The Act clearly prohibits the refusal to hire "a person" on the basis of sex and such persons are not employees.

In addition, the Act is not limited to a discriminatory refusal to hire. The Act not only prohibits the refusal to hire an applicant for discriminatory

reasons, but also makes it illegal to 'maintain a system of employment which unreasonably excludes a person seeking employment" 363.03, subd. 1(2)(a). Also, in addition to making it illegal to "refuse to hire" on the basis of sex, the Act makes it illegal to discriminate against a person with respect to his 'hire or compensation. Section 363.03, subd. 1(2) (c). If discrimination against a person 'with respect to his hire" was merely a repetition of the prohibition making it illegal "to refuse to hire" it would be redundant and unnecessary. Clearly the intent of the Act, which is to be liberally construed, is to make it illegal to discriminate against a person on the basis of his sex with respect to hiring practices generally and not merely with respect to refusals to hire. For these reasons it is concluded that an illegal discriminatory practice can occur under the Act even though the Charging Party is not an employee and was not refused employment.

In rebuttal to the Complainant's prima facie case, Anderson testified that When Maas was offered the job she refused it stating that her husband wanted her to stay home and she wanted to be with her children. Since her rejection was not predicated on the amount of salary offered to her, but on other factors, it is argued that Anderson's subsequent offer to Reddick, at a salary of \$800 monthly, was not discriminatory. Maas' testimony is diametric. She testified that she refused the job on the grounds that the \$700 salary offered was inadequate and that Anderson refused to offer her any more and implied, at least, that the salary was not negotiable. Resolution of these two conflicting versions of the telephone conversation between Maas and Anderson on June 18th is crucial to this case.

Reviewing the testimony of the parties and the other evidence presented, it is concluded that Anderson's proffered legitimate, nondiscriminatory reasons for offering Maas \$100 less than he was willing to offer a less qualified male applicant was a mere pretext and is not worthy of belief, and that the Complainant has established that the Respondent discriminated against her on the basis of her sex by a fair preponderance of the evidence.

Anderson testified that Maas refused the available position at a. \$700 money salary because her husband wanted her to stay 'home and she wanted to be with 'her children. Because she flatly refused the job on those grounds, Anderson testified that he did not offer her a higher monthly salary which he would otherwise have been willing to do. while this is a legitimate, non-discriminatory reason for Anderson's subsequent decision to offer the less qualified male candidate an \$800 monthly salary, the Hearing Examiner is. per-suaded that the articulated reason is pretextual and untrue. (Xi November 7, 1978 Anderson signed an affidavit to be submitted to a -hearing officer with the Minnesota Department of Economic Security in con-nection with an unemployment compensation hearing. In that affidavit Anderson stated that Maas refused the job he offered to her at a monthly salary of \$850 because "the job probably wasn't the right job for her." No mention is made in that affidavit that Maas wanted to stay 'home to be with her children or because her husband wanted her to stay 'home. Anderson's later, inconsistent statements that Maas refused the position at \$700 per month because the wanted to be with her children and her husband wanted her home, coupled with the other inconsistent statements Anderson made concerning her qualifications, the

salaries offered to 'her and Reddick, and the reasons for the differential salary offers made, are so inconsistent that Anderson's testimony at the hearing cannot be credited. Maas' testimony was more consistent and more credible. She had worked consistently for a long period of time and had not taken time off to stay home with 'her children. furthermore, when she became aware that her current position would be terminated by the accounting firm she took steps to seek other employment. It is true that her children would probably not have been in school when her work with the County would have commenced and it is also true that her husband was out of town. Thus, there is at least an inference that her presence at 'home to care for her children during the summer would Tx? necessary. However, that fact, standing alone, does not persuade the Hearing Examiner that Maas had decided to stay home with her children or that she was not desiring of and willing to work for the County when it needed her.

On the contrary, the Hearing Examiner is fully persuaded that Maas desired employment during the summer and was willing to accept and would have accepted the job had it been offered to her on the same conditions that it was offered to Reddick that is, at an \$800 monthly salary. Anderson claimed tht he was surprised when Maas rejected his offer and that he never expected her to be concerned with the salary offered. that testimony is not credible. While Anderson himself testified that he was generally not concerned with the salary he was paid in the various jobs he has held, he clearly must have known that many people are concerned with the salary a particular position pays, and he was aware of Reddick's salary concern. Reddick told Anderson well before Anderson offered Maas the position that he would not accept it for less than \$800 a month. When Anderson offered Maas the position he must have known that he would be required to pay Reddick \$800 if he had to hire him instead. Thus, because of Anderson's inconsistent statements and unlikely testimony, the Hearing Examiner is persuaded that his explanation for offering Reddick more

than he offered Maas is unwortht of belief. In fact, the Hearing Examiner is persuaded that Anderson was simply unwilling to pay a more qualified female candidate as much as 'he was willing to pay a less qualified male for performing the same job and decided that he would hire Maas only if she would work for a lower salary than a man.

The Respondent implied that Reddick's higher salary offer was justified by Reddick's demand for more money and by his worth to the County. Neither

factor changes the proper result in this case. In cases under the Federal Equal Pay Act, the courts have held that a woman's inferior bargaining position, or a tighter market for men, does not justify the payment of lower salaries to women for equal work. See, e.g., Hodgson v. Brookhaven Gen'l Hospital, 436 F.2d 719, 9 F.E.P. 579 (5th Cir. 1970); Brennen v. City Stores, Inc., 479 F.2d 235, 9 F.E.P. 846 (5th Cir. 1973). If Reddick could not be paid more than a woman for performing the Deputy Auditor job, it is not rational to conclude that he could be offered more. As to Maas' and Reddick's relative worth to the County, no evidence was presented justifying a higher salary offer to him. in fact, since Maas was admittedly more qualified it follows that she had more worth.

The Respondent also argued that it is irrational to conclude that he discriminated against Maas because he offered her the job, and that no job offer would have been made if he had a discriminatory motive. The fact that Maas was offered the job is evidence of a lack of discriminatory motive. However, for all the reasons discussed, it is concluded that Anderson's willingness to hire Maas is not inconsistent with a finding of discrimination because he was unwilling to hire her on the same terms and conditions as a less qualified male

In sum, it is concluded that Respondent committed an unfair discriminatory practice by offering a more qualified female applicant a lower starting salary than that offered to a less qualified male applicant offer the female refused the job due to dissatisfaction with the salary offered to her. Making salary offers to females less attractive than salary offers made to males for the same position and where the female is more qualified, constitutes an unfair discriminatory practice for purposes of Minn. Stat. 363.03, subd. 1(2)(c).

Since an unfair discriminatory practice has been established by a preponderance of the evidence, it remains to be decided whether the Charging Party is entitled to back pay measured by the pay she would have received if she had been offered the position on the same terms and conditions that it was offered to Peddick and the salary she actually earned subsequent to her rejection of the job. the Hearing Examiner is persuaded that Maas would have accepted the position had it been offered to her on the same terms and conditions that it was offered to Reddick and that but for the Respondent's discriminatory practice, the Charging Party would have earned the salary subsequently earned by Peddick in the position. For that reason Maas is entitled to back pay, measured by the amount she would have received if offered the position on the same terms and conditions that it was offered to Reddick, less those sums she subsequently earned in other employment.

Back pay plays an important role in employment discrimination cases by providing compensation for the tangible economic loss suffered by those who

are discriminated against. It also acts as a deterrent to violations of the Human Rights laws and as an incentive for the elimination of the vestiges of discrimination. U.S. v. N.L. Indus., Inc., 479 F.2d 354, 379, 6 F.E.P. 116 (8th Cir. 1973). For that reason there is a presumption that back pay be awarded in cases of discrimination involving the hiring of an individual. Albemarle Paper Co. v. Moody, 422 U.S. 405 IV F.E.P. 181 (1975). Likewise, under the Minnesota Human Rights Act it has been held that awards should place individuals discriminated against in the same position they would have been in had no discrimination occurred. Brotherhood of Railway and Steamship Clerks v. Balfour, 303 Minn. 178, 229 N.W.2d 3, 13 (1975). Since Maas would have accepted the position if it had been offered to her on the same conditions that it was offered to a less qualified male, the respondent's discriminatory practices were the proximate cause of Maas' refusal and the wage loss she subsequently incurred. Therefore, it is concluded that she is entitled to receive the salary she would have received, 'but for the discrimination, as Ordered herein, and that this award should be adjusted for interest on the lost salary amounts. In addition, since Anderson was the Douglas county Auditor and since he, himself, was responsible for the discriminatory

practice, punitive damages in the amount of \$250 should be awarded to the Charging Party. City of Minneapolis v. Richardson, 239 N.W.2d 197, 204-05 (Minn. 1976).

Reddick's position was terminated effective June 30, 1980, when he assumed a new position with the County. For that reason, it is concluded that the Charging Party's claim to lost wages should be measured from June 26, 1978, when Reddick began working, until June 30, 1980, when his position was terminated. For 1980, the lost wages should be measured by the difference between Reddick's salary during the first six months of that year and one-half of the Charging Party's actual earnings for 1980.

The Complainant argues that interest should be payable on these lost wages from and after June 26, 1978, and up to the date of the Order herein. That is not an appropriate calculation in this case. Although the Respondent failed to establish any prejudice as a result of the Complainant's failure to serve it's Complaint in this case for nearly five years, it is concluded that the five-year delay involved requires some adjustment in the interest that should be awarded. Consequently, the Charging Party will be awarded interest on her lost wages commencing on June 30, 1980 and ending on June 30, 1983, which was close to the time this matter came on for hearing. For that three-year period, interest at the rate of 6% per annum is appropriate. That amounts to \$2,122.38 in addition to the Charging Party's back pay award of \$11,111.

J.L.L.